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Supreme Court of the United States

OCTOBER TERM, 1958

No. 136

JAMES ALONZO DRAPER, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Petition for Certiorari Filed December 16, 1957
Certiorari Granted June 30, 1958

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1 (File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. CR. 15063

THE UNITED STATES OF AMERICA, *Plaintiff*,

vs.

JAMES ALONZO DRAPER, *Defendant*.

Indictment—Filed Oct. 3, 1956
Transportation and Concealment of Narcotics Illegally Imported, 21 USC 174

The grand jury charges:

That on or about the 9th day of September, 1956, in the City and County of Denver, in the State and District of Colorado, JAMES ALONZO DRAPER did fraudulently and knowingly receive, conceal, sell and facilitate the transportation and concealment of a quantity of a narcotic drug, to-wit, 865 grains of heroin, after said heroin had been imported and brought into the United States, knowing the same to have been brought in contrary to law, in violation of 21 USC 174.

A True Bill,

CHARLES LEWIS SAYRE
Foreman.

DONALD E. KELLEY
United States Attorney

(File endorsement omitted)

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2 IN THE UNITED STATES DISTRICT COURT

Motion for the Return of Seized Property and the Suppression of Evidence—Filed Oct. 17, 1956

James Alonzo Draper, the defendant herein, states and alleges by his attorney:

1. That the defendant was the possessor of certain property on the morning of September 9, 1956, to-wit: one

white envelope containing heroin, one manila envelope containing heroin, and one hypodermic syringe.

2. That two law enforcement officers of the United States, whose true names are unknown to the defendant, on the morning of September 9, 1956, at the premises known as Union Station, 17th Street and Wynkoop, in the City and County of Denver, in the District of Colorado, unlawfully seized and took said property from the defendant.

3. That the said officers seized and took the said property against the defendant's will and without a warrant for his arrest or a warrant for the search of his person or luggage.

WHEREFORE, defendant prays that this Court order the party or parties having possession of the said syringe to return it to the defendant and that the said syringe and said envelopes containing heroin be suppressed as evidence against the defendant in any criminal proceeding.

JOHN J. ALTHOFF
John J. Althoff
Attorney for Defendant
711 E. & C. Bldg.
Denver, Colorado
Phone: CH 4-0728

(File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

(Title omitted)

Transcript of Proceedings on Motion for Return of Seized Property and Suppression of Evidence (Excerpts from)—October 26, 1956

Excerpt of proceedings had before HONORABLE WILLIAM LEE KNOUS, Chief Judge, United States District Court, District of Colorado, in Denver, Colorado, at the Post Office Building, in Courtroom A, on October 26, 1956, at 1:30 o'clock, p. m.

Appearances

HONORABLE JOHN PFEIFFER, Assistant United States Attorney, appearing for the Government.

JOHN J. ALTHOFF, Esq., Attorney at Law, Denver, Colorado, appearing for the Defendant.

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4 The Court: Are you ready to proceed in the Draper case?

Mr. Althoff: If it please the Court, I will proceed by calling the defendant and establishing the facts that are alleged in the motion.

The Court: Very well, he may be sworn and take the stand.

JAMES ALONZO DRAPER,

the Defendant, being duly sworn in his own behalf, testified as follows:

Direct Examination

By Mr. Althoff:

Q. Will you give your name and address to the Court? A. My name is James A. Draper. I live at 2426 Welton.

Q. Were you at the Union Station, 17th and Wynkoop, Denver, Colorado, on the morning of September 9 I believe it was, a Sunday morning of this year? A. Yes.

Q. Did two men forcibly take envelopes containing—

Mr. Pfeiffer: Just one moment. Ask him what happened. Let him tell what happened.

Mr. Althoff: All right.

Q. Mr. Draper, will you describe the circumstances which took place? A. I was in the passenger tunnel
5 at Union Depot. One man grabbed me by each arm and proceeded, one man entered my left coat pocket, and the other man took my grip from my right hand and proceeded to search my grip, and they both took articles that later on it was alleged to have heroin, narcotics.

Q. Do you know who these men were? A. One is sitting there, the one on the right.

Q. Which one? A. The one on the right.

Q. Your right? A. My right.

The Court: He is pointing to Mr. Marsh, I assume. Is this the one you are talking about?

The Witness: Yes.

The Court: That is Mr. Marsh.

Mr. Althoff: Let the record show that the defendant identified Mr. Marsh as one of the men that accosted him.

Q. Did these men serve you with a copy of a warrant for your arrest? A. No. They never served me with any identification.

Q. Did they speak to you before they removed these various articles from your possession. A. Yes.

6 Q. What did they say? A. They asked my name.

Q. And what did you answer? A. I said, "James Draper".

Q. What happened next? A. They proceeded to go through the motions that I described before.

Q. Now, did you consent to their removing these various articles from your possession? A. No.

Mr. Althoff: That is all.

The Court: I would like to know, I do not know yet what was taken from him and where it was located, whether it was in his pocket or where it was.

The Witness: It was in my coat pocket.

The Court: What was taken from you?

The Witness: Two envelopes.

The Court: This motion says something about a hypodermic syringe.

The Witness: That was taken from my grip.

The Court: Where were the envelopes?

The Witness: In my coat pocket.

The Court: And the syringe was in your grip in your suitcase?

7 The Witness: In my grip.

The Court. Was it opened there in your presence at the same time?

The Witness: It was opened at my side.

The Court: I mean that was opened and the search made right there?

The Witness: It was opened by the gentleman I just identified. The grip was opened by the gentleman that I identified.

The Court: These envelopes contained heroin, as I understand, is that right?

Mr. Althoff: The defendant infers they contained heroin.

The Court: I won't pursue that. The Government may cross-examine.

Cross Examination

By Mr. Pfeiffer:

Q. What was in these envelopes that they took from you? A. Allegedly heroin. I am not a chemist. I don't know.

Q. Who owned what was in those envelopes? A. I do.

Q. They were yours? A. The envelopes were mine.

Q. Now, the substance in the envelopes is yours?

8 A. Yes.

Q. Whether it is heroin or whether it is milk sugar, is that correct? A. Yes.

Q. Where do you live? A. 2426 Welton.

Q. How long have you lived there? A. Since the last of August, first of August—correction, please.

Q. First of August? A. Yes.

Q. Where had you come from when you got off the train? A. Chicago, Illinois.

Mr. Althoff: If the Court please, I object to this.

The Court: Unless there is some purpose, I think I will sustain the objection. What we are interested in here is not the general history of the case but whether this search was unlawful.

Mr. Pfeiffer: I believe I am entitled to show where he came from.

The Court: What has that to do with it?

Mr. Pfeiffer: To show probable cause.

The Court: You might indicate to me the relevance.

9 Mr. Pfeiffer: The Government believes—

The Court: The question here is—

Mr. Pfeiffer: All right, I won't go into it at the present time.

The Court: I do not see where that is particularly relevant now. It may be in a moment but not now.

Q. At the Union Station you got off the train, didn't you? A. Yes.

Q. And where did you go when you got right off the train? A. I walked down the stairs.

Q. You walked down the stairs? A. Yes.

Q. This is down at the Union Depot here in Denver? A. Yes.

Q. And at that time when you got down the stairs you started up the other stairs, didn't you? A. No.

Mr. Althoff: I am going to object to this, if the Court please.

The Court: This is all right to show what happened. I gather this was right at the time of the search. I infer it is.

Q. Now, you got off the train and walked down
10 the steps? A. Yes.

Q. And then at that time Agent Marsh over here and did Mr. Seaton—was that the other gentleman? A. No.

Q. That is not the other gentleman? A. No.

Q. Two people, anyway, one of them was Agent Marsh, came up to you, did they? Did they or didn't they? A. Two people. This gentleman here.

Q. Was there another person with him? A. Yes. I can identify him too.

Q. What did they say to you at that time? A. "What is your name?"

Q. "What is your name?" A. Yes.

Q. What did you answer to them? A. "James Draper".

Q. Didn't you say your name was Francis Smith? A. Yes, at one time.

Q. You said when they asked you—

Mr. Althoff: I object to that.

The Court: Objection overruled. This is proper. This was at the time of the search. The objection will
11 be overruled.

Q. The first time that they came— A. I might say Carl Francis was the person I was to deliver the envelope to, and I asked him if his name was Carl Francis.

Q. You asked Mr. Marsh if his name was Carl Francis? A. And then the other gentleman on my right, he said, "What is your name?" I said, "James Draper", and then he went into my hip pocket and pulled my billfold out with my identification.

Q. Pulled your billfold out? A. Yes.

Q. Didn't you say your name was Francis Smith? A. No.

Q. Now, were you ever placed under arrest?

The Court: Ask him what was said.

Q. When you came up, when they first came up to you just tell me what was said. A. When they first approached me?

Q. That's right. A. The first thing they said?

Q. Yes. A. "What is your name?" And I said, "James Draper."

Q. At that point didn't Agent Marsh say, "You
12 are under arrest"? A. No.

Q. Didn't he show you his badge? A. No.

Q. He didn't? A. No.

Q. Now, what else happened then? What did they say to you? A. They proceeded to go through my bag. They never said anything.

Q. They didn't say anything more? A. Not asking me questions.

Q. Did the other person that was with Agent Marsh ask for your billfold? A. No.

Q. Did you give him your billfold? A. No.

Q. Did they take your billfold? A. Absolutely did.

Q. Where was your billfold? A. In my hip pocket.

Q. And they took it from you? A. Yes.

Q. Did you at any time see a badge? A. No.

13 Q. Did they at any time identify themselves? A. No.

Q. I may have made a mistake here. Did you tell them your name was Carl Francis? A. No.

Q. You didn't? A. No.

Mr. Pfeiffer: No further questions.

The Court: Do you want to ask him further questions?

Mr. Althoff: No redirect. Your Honor, it is our contention that the burden is upon the Government to show probable cause.

The Court: I think you have offered prima facie case to support your motion. I will hear from the Government.

---

14 JOHN W. MARSH,

a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination

By Mr. Pfeiffer:

Q. Would you please state your name? A. John W. Marsh.

Q. Where do you live, Mr. Marsh? A. Denver, Colorado.

Q. What is your occupation or profession? A. A narcotics agent for the U. S. Treasury Department.

Q. How long have you been so engaged? A. 29 years.

Q. Were you so engaged in the months of August and September of this year? A. I was.

Q. Now, Agent Marsh, were you assigned or are you in charge of a case entitled James Alonzo Draper? A. I am.

Q. Agent Marsh, when did you first receive information in regard to James Alonzo Draper? A. On about September 3, 1956.

Q. What was that for? A. I received information from a reliable source that James Draper was living upstairs at 2426 Welton Street and was peddling Heroin.

Mr. Althoff: I am going to object to that. It is hearsay. If they want to establish these facts, they should bring forth the informer so I have an opportunity to cross-examine that informer.

The Court: Well, I think there may be some exceptions about that, but you may be entitled to demand the name of the informer I think under special circumstances. Do you have any law with you on that?

Mr. Pfeiffer: We have law on the situation that a special employee of the Bureau of Narcotics is confidential and does not have to be disclosed, but at this time I will disclose the person.

Q. Agent Marsh, who was the person you talked to? A. James A. Hereford.

Q. Where is James A. Hereford at the present time? A. He has been dead since September 13, 1956.

Q. Now, would you go on with the information that you received on September 3? A. The information was that James A. Draper or James Draper was peddling Heroin to several addicts here in Denver. Later on September 7 I received additional information from the same source that Draper had gone to Chicago the day before, which was September 6, that he had gone by train, that he was going to bring back approximately three ounces of Heroin, that he would return to Denver either on the morning of the 8th of September or the morning of the 9th of September also by train. That he was wearing a light-colored raincoat, brown slacks, and black shoes, that

he was carrying a tan zipper bag. That as a further description that he habitually walked real fast.

On September 8 I went to the Union station.

Mr. Althoff: I make a motion to strike his entire answer up to this point because it is all hearsay.

The Court: The objection will be overruled. If you will look at the cases, this is the kind of evidence that is admissible on a question of proper cause I think.

Mr. Pfeiffer: That's correct.

The Court: We will see what it leads to.

A. I watched at the Union Station, met all the incoming trains from Chicago on September, and the person that was described to me did not appear.

Q. Who else was present at that time? A. Agent Gress, Agent Ford, and Detectives—

Q. Agent Gress and Agent Ford are Agents of what?

A. Of the Bureau of Narcotics, and Detective Bates,
17 he is with the Denver Police Department.

Q. Under whose supervision were they acting that day? A. Under mine. On the following morning I went to the Union Station with Sergeant Seaton of the Denver Police Department, Detectives Forden and Bloom and also the two Narcotics Agents Ford and Gress. We stationed ourselves at different positions around the terminal, and at 8:20 a.m. Sergeant Seaton gave me a signal that he had spotted our suspect, and I turned around and saw the defendant coming from the pullman section of the California Zephyr. He was walking fast and was carrying a light tan bag. He had on a light raincoat, gray hat, brown slacks, and black shoes. He was the same weight, height and age as the man who had been described to me. We followed him down the stairway into the subway, walked up behind him. I walked on his right, showed him my official badge, and told him he was under arrest. Sergeant Seaton at the same time took ahold of his left arm, identified himself to him. The first thing I asked him, "What is your name?" And he said, "Carl Francis." I said, "Do you have any identification on you?" Either he produced his billfold or I removed it from his pocket, and in the billfold I found I had James A. Draper.

At the same time Sergeant Seaton held the defend-
18 ant's left hand out, and he was holding in his hand

two paper packages which we later examined and found contained Heroin. He also had a smaller paper bundle in his pocket containing a few grains of Heroin. All together there were 865 grains of Heroin, approximately two ounces.

Q. You say he was carrying a leather zipper bag? A. Yes, light tan leather zipper bag.

Q. Did you open that bag? A. Yes, we opened the bag.

Q. When did you do that? A. I opened it first right there at the depot.

Q. In whose presence did you open it? A. In the presence of the defendant and Sergeant Seaton.

Q. What did it contain? A. It contained toilet articles and a hypodermic outfit.

Q. Hypodermic syringe? A. Yes.

Q. And after that what did you do if anything with the defendant? A. We took him to the office of the Bureau of Narcotics, gave him all the warnings that he was not, he did not have to make a statement, that any statement he made could be used against him.

19 Q. Did you place him in custody? A. Yes.

Q. Now, Mr. Hereford, what was he in relation to the Bureau of Narcotics in common vernacular? A. He was what we call a special employee. He furnished information, and we paid him small sums of money for the information.

Q. How long had he been a special employee prior to this time? A. I believe about six months.

Q. Had he furnished information to you before? A. Yes.

Q. Did you corroborate that information? A. Yes.

Q. What did you find? A. I found that his information was always reliable.

Mr. Pfeiffer: I have no further questions.

Cross Examination

By Mr. Althoff:

Q. Officer, what caused you to pick out this man among all the people that disembarked from that train? A. Well, first, he was a negro, second, he was about 27 years of age, third, he was about 5 foot 8 inches in height, fourth, he weighed about 160 pounds, fifth, he had light brown complexion, sixth, he had a gray felt hat, seventh, he had a light

tan raincoat, eighth, he was carrying a light tan
20 leather zipper bag. In fact, he fit the description that I had very accurately of the suspect.

Q. Where did you obtain the description? A. From Robert Hereford.

Q. And he is the informer in this case? A. Yes.

Q. In other words, if it wasn't for this informer, there would be absolutely no facts that you personally knew that would give grounds for probable cause to arrest this man, all the facts you have were gained from this informer, is that not right? A. That's right. That is where the information came from.

Mr. Althoff: That is all.

The Court: Any further questions?

Mr. Pfeiffer: No further questions.

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21 GEORGE L. SEATON,

a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination

By Mr. Pfeiffer:

Q. Would you please state your name? A. George L. Seaton.

Q. Where do you live, Mr. Seaton? A. Denver, Colorado.

Q. What is your occupation or profession? A. Sergeant, Police Department, City and County of Denver.

Q. Sergeant, do you know James Alonzo Draper? A. Yes.

Q. Do you know the defendant here? A. Yes.

Q. When did you first see him? A. About 8:20 a. m. on September 9, 1956.

Q. And where were you at that time? A. Union Station Denver, railroad station.

Q. What were you doing there? A. I was there with Agent Marsh.

Q. And why were you down there? A. I was there to attempt to apprehend a party, a party that we had a description of.

22 Q. Who was the party? A. I only had the description.

Q. What was that description? A. Negro, light brown complexion, wearing a gray hat, nylon light tan-colored raincoat, black shoes, brown trousers, and might possibly be carrying a light tan zipper bag.

Q. Did you see such a person that day? A. Yes, I did.

Q. What happened then, if you will just relate what happened. A. The party that I observed that answered the description was about the last one to step off the train. He immediately headed for the stairway to go down to the tunnel to start toward the street. Agent Marsh was near me, and I spoke to him and told him that I thought our suspect had just alighted, and he saw him also. We started down behind him. He was walking very fast. I went up on his left side, Agent Marsh on his right. I took him by the left arm, and I had this badge and my identification, and I said, "Police Officer. We would like to talk to you." Agent Marsh had his badge, showed him his identification, identified himself as a Narcotics Agent. I believe Agent Marsh asked him his name. He stated, "My name is Carl Francis."

Then we asked him to step back inside the stairway to be out of the way of traffic moving there, and he asked
23 him for his identification. I don't remember whether he, Draper, removed it or whether Agent Marsh removed it from his hip pocket. I believe it was the right hip pocket, and the identification proved to be James A. Draper that he was carrying.

Q. Continue right on. A. From the time I spotted Draper alight from the train he kept his left hand in his raincoat pocket and never removed it carrying the zipper bag in his right hand walking very fast. I asked him what he had in his coat pocket. He didn't say a word, so, I tried to pull it out, and he was reluctantly holding his hand in the raincoat pocket, and I could feel that his fist was clenched. As I put a little more pressure he gradually let it come out, and he had these two glacene paper bags with a substance in those, and I took those, immediately gave them to Agent Marsh. There was another small paper in the bottom of the pocket which I brought out myself and handed to Agent Marsh.

Q. And you turned that over to Agent Marsh? A. Yes, sir.

Q. What was done with the leather bag? A. It was searched there in the tunnel. A hypodermic outfit and some clothes and toilet articles were in the bag.
24 That was taken with Draper to the Narcotics Bureau office.

Mr. Pfeiffer: No further questions.

Cross Examination

By Mr. Althoff:

Q. Sir, would you mind repeating who you work for? A. Police Department, City and County of Denver.

Q. How did you happen to meet Mr. Marsh, and how did you happen to go on this mission to the depot with Mr. Marsh? A. Mr. Marsh called my home on the evening of September 8 approximately 8:00 p.m. I was at the ball park, and my wife called and stated that he wanted to get in touch with me. I called him at his home. He wanted to know if I had a couple of men I could spare on Sunday morning to meet some trains at the railroad station. I stated yes, I thought so; if not, I would be there myself. I contacted one detective. I didn't know exactly when the other one would come in since it was Sunday. We work irregular shifts. So, I went down myself.

Q. In other words, you were cooperating with Mr. Marsh, with the Federal authorities? A. Yes. He said they expected possibly someone to come in on the train.

Q. And he sought your cooperation, and you gave it to him? A. Yes.

Q. Now, will you tell the Court what facts you had
25 by personal observation which would give rise to probable cause to arrest this man without a warrant?

Mr. Pfeiffer: That calls for a legal conclusion.

The Court: He asked him what facts he had.

Mr. Pfeiffer: Facts, that's right.

The Court: I think he can answer the question. Did you understand the question.

The Witness: Repeat it, please.

(The reporter read the last question.)

Q. What facts did you have? What facts did you gain by your personal observation which gave basis for the conclusion that there was a probable cause to arrest this man

without a warrant? A. Well, in the first place, Agent Marsh told me this party might possess heroin. The description fit very closely.

Q. I don't understand this description.

The Court: I think he is answering the question.

Mr. Althoff: All right, your Honor.

Q. Continue. A. And as he got off the train he held this left hand in his coat pocket as if he had something. He seemed in a hurry walking very fast as if he wanted to get away from the area.

Q. At the time you knew of no other facts other than the facts that Mr. Marsh outlined?

26 The Court: No, he just stated the facts. You can ask him if there were any other facts in addition to what he stated that led to that conclusion.

Q. Are there any other facts? A. No other facts.

Q. Did you ever see the defendant before he disembarked from this train? A. That was the first time I ever saw the man.

Mr. Althoff: That is all.

Redirect Examination

By Mr. Pfeiffer:

Q. You say you were down there—

Mr. Pfeiffer: Well, this may be on direct examination, but I would like to clarify it if I may ask a couple of questions that may be direct.

The Court: All right.

Q. Who else was down there with you?

The Court: You mean in the whole station or where?

Q. When you originally went down to the Union Depot who was with you? A. Detective Wilbur Norton, Detective Frank Orville, and myself. We met Agent Marsh, Agents Gress and Ford at the Depot.

Q. Now, where did you and Mr. Marsh go? A. Mr. Marsh and I stayed near the front end of the train

27 where it would stop approximately, near the stairways that go into the tunnel. I believe the other two Agents paired off down toward the other end of the train.

Q. By the other end? A. The rear end.

Q. The rear end of the train? A. The front end. I believe they backed in.

Q. Were all four of you together? A. No. I believe they were paired up.

Q. What was happening at this time down in the Union Station, do you know? Was there a strike on? A. Yes, there was.

Q. And where were the trains stopping? A. Well, the trains I think would stop in the yards at first, and then they didn't have sufficient crews, and it seemed as though some of the railroad officials would ride in with the train or something to that effect.

Q. Were people alighting from the train back out there? A. Yes.

Q. Did one of the groups of two go back there? A. Yes.

Mr. Pfeiffer: I have no further questions.

Mr. Althoff: No further questions.

28 The Court: You may step down then.

Mr. Pfeiffer: I do not know if this is proper, but I neglected to ask the defendant one question on cross examination. Would it be proper to recall him for one question?

The Court: He may take the stand.

JAMES ALONZO DRAPER,

the defendant, having been formerly sworn, resumed the stand, and testified as follows:

Cross Examination

By Mr. Pfeiffer (Continued):

Q. You are the same James Draper that has previously testified in this matter, are you not? A. Yes.

Q. Mr. Draper, have you ever been convicted of a felony? A. Yes.

Q. What was that felony? When was that? A. Possession of narcotics.

Q. When was that? A. At what time?

Q. Yes, in what year? A. 1950.

Q. And you say narcotics, what do you mean, what type of narcotics? Was it heroin? A. I am not a chemist. I don't know.

Q. Did they charge you with heroin? A. Yes. I
29 pleaded guilty.

Q. You pleaded guilty to that? A. Yes.

Mr. Pfeiffer: No further questions. The Government rests, your Honor.

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30 Reporter's Certificate to foregoing transcript omitted in printing

31 IN THE UNITED STATES DISTRICT COURT

Honorable Donald E. Kelley, United States Attorney for the District of Colorado; John C. Pfeiffer, Assistant United States Attorney, Post Office Building, Denver, Colorado, for The United States of America; John J. Althoff, Esquire, 711 E. & C. Building, Denver, Colorado, for Defendant.

Memorandum Opinion and Order on Motion for Return of Seized Property and Suppression of Evidence—Dec. 11, 1956

Knous, Chief Judge.

This matter arises upon the timely motion of defendant under Rule 41(b) F.R.Cr.P. "for the return of seized property and the suppression of evidence." The defendant has been indicted for receiving and facilitating the transportation of heroin in violation of 21 U.S.C. § 174. By his motion he alleges in effect that certain law enforcement officers committed an illegal and unreasonable search of his person and possessions, and thereafter seized from him a quantity of heroin and a syringe. His motion seeks to suppress evidence of the heroin and a return to him of the syringe.

A hearing had upon the motion disclosed the following facts: John W. Marsh, a narcotics agent for the U. S. Treasury Department, received information from one James A. Hereford, since deceased, on or about September 3, 1956,
that the defendant was "peddling" heroin to ad-
32 dicts in Denver. This was the first notice Agent Marsh or his department had of the defendant and his alleged activities. Mr. Hereford had been a special employee of the Bureau of Narcotics for some six months prior to that time, receiving small sums of money for in-

formation. His information in the past had always been corroborated and found to be reliable.

Thereafter, on September 7, 1956, Agent Marsh received information from the same source that the defendant had left by train for Chicago the day before and would return by train to Denver on either the morning of September 8 or 9, with a quantity of heroine. A complete description of the defendant and his wearing apparel was given, and also that he was carrying "a tan zipper bag" and habitually walked "real fast."

Agent Marsh and other law enforcement officers went to the Denver Union Station on September 8, but the defendant did not show up. The surveillance was repeated on the morning of the ninth. The defendant at that time was seen to alight from a train. He fit the description given Agent Marsh precisely, was walking in a hurried manner, carrying the zipper bag in his right hand, and with his left hand thrust in his coat pocket. Marsh, in conjunction with Detective Seaton of the Denver Police Department, approached the defendant, showed him his identification badge, and placed him under arrest. Following this, the defendant was asked his name, his reply was false; his billfold was taken from him which disclosed his correct identity; his left hand was pulled from his coat pocket disclosing two paper packages containing heroin, and his zipper bag was searched disclosing the syringe. Thereafter, he was taken to the office of the Bureau of Narcotics and retained in custody.

33 The officers proceeded as above set forth without a warrant of arrest or search warrant.

The Government seeks to sustain the search and seizure upon the ground that it was made incident to a lawful arrest. *United States* v. *Rabinowitz*, 339 U.S. 56 (1950); *United States* v. *DiRe*, 332 U.S. 581 (1948); *Harris* v. *United States*, 331 U.S. 145 (1947).

It was formerly the well-recognized rule that state law governed the validity of an arrest made without warrant. *Johnson* v. *United States*, 333 U.S. 10 (1948); *United States* v. *DiRe*, supra. However, by Public Law 728, Sec. 104, 70 Stat. 570, July 18, 1956, Congress has now made uniform the law governing arrests by narcotic agents in these circumstances, by providing that such agents, among others, may

> "(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs . . . where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

Thus, we are faced with the question of whether Agent Marsh and those under his direction, had reasonable grounds, or probable cause, to believe that the defendant had committed or was committing an offense.

It is strongly urged by the defendant that there was no probable cause for the arrest, for it is alleged, probable cause cannot be based upon uncorroborated hearsay information standing alone. *Worthington* v. *United*
34 *States*, 166 F. (2d) 557, 6 Cir., (1948); *Wisniewski* v. *United States*, 47 F. (2d) 825, 6 Cir., (1931); *United States* v. *Clark*, 29 F. Supp. 138, D.C. Mo., (1939); *United States* v. *Hill*, 114 F. Supp. 441, D.C. D.C., (1953); *United States* v. *Castle*, 138 F. Supp. 436, D.C. D.C., (1955); *United States* v. *Turner*, 126 F. Supp. 349, D.C. Md., (1954). Apparently, were the Second Circuit to be faced with the precise question, its view would be contrary. *United States* v. *Li Fat Tong*, 152 F. (2d) 650, (1945); *United States* v. *Heitner*, 149 F. (2d) 105, (1945), cert. den. 326 U.S. 727; *Somer* v. *United States*, 138 F. (2d) 790, (1943); *United States* v. *Gowen*, 40 F. (2d) 593, (1930), reversed on other grounds, *Go Bart Co.* v. *United States*, 282 U.S. 344. See also *Cannon* v. *United States*, 158 F. (2d) 952, 5 Cir., (1946), cert. den. 330 U.S. 839; *King* v. *United States*, 1 F. (2d) 931, 9 Cir., (1924).

An examination of the authorities by the Court has disclosed no decisions of the United States Supreme Court or the Tenth Circuit Court of Appeals directly touching upon this question. The Government contends that a phrase contained in the decision of *McIntire* v. *United States*, 217 F. (2d) 663, 666, 10 Cir., (1954), cert. den. 348 U.S. 953, to the effect that a peace officer may arrest without warrant on reasonable, trustworthy information, is controlling here. The phrase, however, is taken from the context of a decision which was not rendered upon the force to which the

Government attributes the phrase. However, the efficacy of the principal authority relied upon by the defendant in support of his contention, *Worthington* v. *United*
35 *States,* supra, as such authority, is open to some doubt. The decision of *Grau* v. *United States,* 287 U.S. 124 (1932), in so far as it held that a search warrant may issue only on facts competent before a jury on the trial of the offense, met with express disapproval in *Brinegar* v. *United States,* 338 U.S. 160, ftn. 13, 174-175 (1949). The substance of *Worthington* flowed from this principle enunciated in *Grau.* How much of the former fell with the latter is not easily determinable.

Be that as it may, in the opinion of the Court, under the facts here attending, the controversy is more academic than real. The term "probable cause" was given as close a definition, or, perhaps, more correctly, as close a "meaning" as the phrase itself permits, in *Brinegar* v. *United States,* supra. There, at pages 175 and 176 of 338 U.S., the Supreme Court stated:

> " 'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.' *McCarthy* v. *De Armit,* 99 Pa. St. 63, 69, quoted with approval in the *Carroll* opinion, 267 U.S. at 161. And this 'means less than evidence which would justify condemnation' or conviction, as Marshall, C.J., said for the Court more than a century ago in *Locke* v. *United States,* 7 Cranch 339, 348. Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll* v. *United States,* 267 U.S. 132, 162.
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> 36 "These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambig-

> uous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

Applying these principles to the instant action, it is the opinion of the Court, that the Government has shown that Agent Marsh acted with probable cause in arresting the defendant, i.e., that he was acting not upon mere suspicion but in fact had reasonable grounds for his belief in the guilt of the defendant.

Agent Marsh has a long record of service in ferreting out violators of the narcotic laws. The name of his informer was disclosed at the hearing had upon this motion. By the uncontradicted testimony of Agent Marsh, it was established that in his personal knowledge and through his own corroboration, the information supplied him in the past by this informer was reliable. The day which the defendant alighted from the train in Denver was upon one of the days specified by the informer that such event would take place. The description of the defendant as observed by Agent Marsh fit precisely that described to him. The gait of the defendant and the "luggage" carried by him were observed as described. As he
37 walked, the defendant kept his left hand, which upon search disclosed the heroin, thrust in his coat pocket. Thus, the one remaining fact contained in the information, albeit the all important fact, not observed by Agent Marsh, was the presence of the heroin.

From these facts, it cannot be said that Agent Marsh acted other than as "a cautious man in the belief that the party [was] guilty of the offense with which he [was] charged." *Stacey* v. *Emery*, 97 U.S. 642, 645 (1878). A belief in the presence of an unobserved fact contained in information deemed, by reason of corroboration of similar information received from the same source in the past,

as trustworthy where all the other facts contained in the information have been observed as true, is not the unreasonable belief of an uncautious man.

The arrest having been lawfully made, the incident search and seizure was not in violation of the Fourth Amendment to the Constitution. Accordingly, it is

ORDERED AND ADJUDGED that defendant's Motion for the Return of Seized Property and the Suppression of Evidence, be, and the same is hereby denied.

DATED at Denver, Colorado, this eleventh day of December, A. D. 1956.

WILLIAM LEE KNOUS
William Lee Knous,
Chief Judge.

(File endorsement omitted)

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38 IN THE UNITED STATES DISTRICT COURT

Order of Judgment and Commitment—Jan. 30, 1957

It appearing that the defendant, JAMES ALONZO DRAPER, appeared in person and by counsel on the 12th day of October, 1956, and being arraigned, pleaded not guilty to the charges contained in the Indictment, and that thereafter on the 16th day of January, 1957, following trial to the court, defendant was found guilty of the offense of transportation and concealment of narcotics illegally imported, 21 USC 174; and that on, to-wit, the 30th day of January, 1957, the United States Attorney filed a Supplemental Information setting forth one prior conviction of said defendant of an offense, the penalty for which is provided in Section 174, Title 21 USC, and the defendant having affirmed in open court that he is identical with the person previously convicted in conformity with the provisions of the aforementioned Section 174, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the court;

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of ten (10) years from this date on the Indictment herein.

39 It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

EWING T. KERR
United States District Judge
Assigned

(File endorsement omitted)

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40 IN THE UNITED STATES DISTRICT COURT

Notice of Appeal—Filed Jan. 31, 1957

COMES Now the defendant herein by counsel and states:

1. That defendant's name and address are: James Alonzo Draper, 2426 Welton Street, Denver, Colorado.

2. That defendant's court-appointed attorney herein is John J. Althoff, 711 Ernest & Cranmer Building, Denver, Colorado.

3. That the indictment herein charged said defendant with the transportation and concealment of narcotics illegally imported into the United States.

4. That this Court denied defendant's motion for judgment of acquittal on January 16, 1957, and entered a judgment of conviction of the crime charged in the indictment herein on January 16, 1957.

5. That the defendant herein was sentenced to ten years imprisonment on January 30, 1957.

6. That the defendant is presently confined in the County Jail for the City and County of Denver and the State of Colorado.

7. That the above named defendant hereby appeals to the United States Court of Appeals for the Tenth Circuit from the above-stated judgment.

Dated this 31st day of January, 1957.

JOHN J. ALTHOFF
John J. Althoff
Attorney for Defendant
711 E. & C. Bldg.
Denver, Colorado
CHerry 4-0728

(File endorsement omitted)

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41 IN THE UNITED STATES DISTRICT COURT

Order Granting Leave to File Appeal in Forma Pauperis—Jan. 31, 1957

This matter coming to the attention of the Court on the Motion and Affidavit in Forma Pauperis for Leave to File Appeal Without Prepayment of Fees, and the Court having examined said Petition and Affidavit, it is

ORDERED:

1. That the Court certifies that the appeal is taken in good faith and presents a substantial question.

2. That the defendant be permitted to file the Notice of Appeal without the prepayment of fees and costs, as provided by Section 1915, Title 28, U.S.C.

3. That the Clerk's Office prepare for filing in the United States Court of Appeals for the Tenth Circuit an original and three copies of the transcript of record, without the prepayment of the fees therefor.

4. That the Clerk include in the record on appeal the following:

(a) Indictment

(b) Defendant's Motion for the Return of Seized Property and the Suppression of Evidence

(c) Memorandum Opinion and Order

42 (d) Reporter's excerpt of proceedings had on October 26, 1956

(e) Judgment and Commitment

(f) Notice of Appeal

and transmit the original exhibits.

DATED at Denver, Colorado, this 31st day of January, A. D. 1957.

BY THE COURT:

WILLIAM LEE KNOUS
United States District Judge

(File endorsement omitted)

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43 **Clerk's Note Re Exhibits**

Plaintiff's Exhibits Numbered 1, 2, 2A, 2B, 2C and 3, are transmitted under separate cover herewith.

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44 **Clerk's Certificate to Foregoing Transcript**

(Omitted in printing)

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45 IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Order of Submission—May 15, 1957

Before Honorable Sam G. Bratton, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard and was argued by counsel, John J. Althoff, Esquire, appearing for appellant, John S. Pfeiffer, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

46 IN THE UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5593 — September Term, 1957

JAMES ALONZO DRAPER, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court
for the District of Colorado

Opinion—September 12, 1957

John J. Althoff for Appellant.

John S. Pfeiffer, Assistant United States Attorney, (Donald E. Kelley, United States Attorney, was with him on the brief) for Appellee.

Before BRATTON, *Chief Judge,* and HUXMAN and MURRAH, *Circuit Judges.*

BRATTON, *Chief Judge.*

47 The indictment in this case charged that appellant fraudulently and knowingly received, concealed, sold and facilitated the transportation and concealment of 865 grains of heroin, after it had been imported into the United States, knowing it to have been brought in contrary to law. Appellant seasonably filed a motion to suppress as evidence two envelopes, certain heroin in the envelopes, and a hypodermic syringe, upon the ground that they had been taken from him by means of an unlawful search and seizure. A hearing was had upon the motion, at which evidence was adduced tending to establish these facts. John W. Marsh was an agent of the Bureau of Narcotics in Denver, Colorado. For approximately six months prior to September 3, 1956, James A. Hereford acted as a special employee for the Bureau in Denver. During that time, he furnished information to Marsh concerning violations of the narcotics act, for which he was paid small sums of money; and the information furnished was always found

to be reliable. On September 3, Hereford informed Marsh that appellant lived upstairs at a certain address in Denver; and that he was peddling heroin to several addicts in Denver. Four days later, on September 7, Hereford informed Marsh that appellant had gone to Chicago the previous day; that he had gone by
48 train, that he was going to bring back approximately three ounces of heroin; and that he would return by train either on the morning of the 8th or the morning of the 9th. And Hereford described appellant as a Negro, about 27 years of age, about 5 feet and 8 inches in height, weight about 160 pounds, and had a light brown complexion; that he wore a gray felt hat, brown slacks, black shoes, and a light brown raincoat; that he was carrying a light tan leather zipper bag; and that he habitually walked very fast. On the morning of September 8, Marsh and other officers went to the union station in Denver and watched incoming trains but they did not see anyone meeting the description which Hereford had furnished. On the following morning, Marsh and other officers again went to the station. Appellant alighted from a train arrivng from Chicago. He met the description which Marsh previously received from Hereford. He walked very fast, was carrying a tan zipper bag, and had his left hand in his raincoat pocket. Without any warrant of arrest or search warrant, Marsh and a member of the police force walked up behind appellant. One took him by the left arm and the other by the right. They identified themselves and asked appellant his name. He replied that his name was
49 Carl Francis. Marsh inquired whether he had any identification. His billfold was removed from his pocket and through that source Marsh found that he was in fact appellant. Marsh told him that he was under arrest; and with some difficulty, his left hand was pulled out of the raincoat pocket. His clenched fist was around two glassine paper bags which contained approximately one ounce of heroin each. The zipper bag was opened by the officers and it contained among other things a hypodermic syringe. The testimony establishing these facts was given by Marsh. Hereford died before the hearing and therefore did not testify. The motion was denied,

146 F. Supp. 689; the seized effects were admitted in evidence on the trial of the case; appellant was convicted; and from the sentence imposed, he appealed.

It is urged that the judgment should be reversed for error in denying the motion to suppress the evidence. The argument is that the arrest of appellant was unlawful; that since the arrest was unlawful, the search and seizure were unlawful; and that the incriminating evidence obtained by means of the search and seizure was inadmissible. Section 104(a)(2) of the Narcotic Control Act of 1956, 70 Stat. 567, 26 U.S.C. § 7607(2), pro-
50 vides in presently pertinent part that an agent of the Bureau of Narcotics may make arrests without warrant for violations of any law of the United States relating to narcotic drugs where such agent has reasonable grounds to believe that the person to be arrested has committed or is committing such violation. The statute does not define "reasonable grounds" to believe that a violation has been or is being committed. That question must be determined in each case depending upon the particular facts and circumstances. But it may be said in general language that "reasonable grounds" for such belief exist when the facts and circumstances, together with the reasonable inferences fairly to be drawn from them, are such as would lead a reasonably intelligent, discreet, and prudent person to conclude that there is good ground to believe that the law relating to narcotic drugs has been or is being violated. Compare, Bruner v. United States, 150 F.(2d) 865; McIntire v. United States, 217 F.(2d) 663, certiorari denied, 348 U.S. 953; United States v. McCall, 243 F.(2d) 858. And it is not essential that the agent have before him legal evidence of the suspected violation. It suffices if the apparent facts coming to his attention are sufficient to lead a reasonably discreet, cautious, and prudent man to believe in good faith
51 that the illegal act has occurred or is occurring. Husty v. United States, 282 U.S. 694; United States v. Sebo, 101 F.(2d) 889; United States v. Heitner, 149 F.(2d) 105, certiorari denied, 326 U.S. 727; United States v. Li Fat Tong, 152 F.(2d) 650.

Information coming to an agent of the Bureau of Narcotics from an anonymous, undisclosed, or unverified

source, standing alone and without more, is not enough to furnish such agent reasonable grounds to believe that a person has committed or is committing a violation of the Narcotics Act, and therefore may be arrested and searched without authorizing process. Worthington v. United States, 166 F.(2d) 557; Contee v. United States, 215 F.(2d) 324; Wrightson v. United States, 222 F.(2d) 556. But the arrest, search, and seizure in this case were predicated upon more than information coming from an anonymous or undisclosed source. It came from a special employee of the Bureau of Narcotics. He had furnished information on previous occasions and it had unfailingly proved to be reliable and trustworthy. The information given on this occasion went into details. The informer gave the address of appellant; described him in respect to race, complexion, age, weight, dress, walk, and bag carried.
52 In addition, the informer gave the time of appellant's departure from Denver, his destination, the time of his return, and his mode of travel. And the information thus furnished the agent of the Bureau was verified by the officers as far as it could be done by observation after appellant alighted from the train. He alighted from a train inbound from Chicago. He arrived at the time specified in the information. The officers observed his race, complexion, height, weight, walk, dress, and kind of bag carried. And in respect to each and all of these details, the information furnished by the special employee was verified. The information furnished, together with the verification thereof after appellant alighted from the train, was sufficient to give the agent reasonable grounds to believe that appellant was committing a violation of the Narcotics Act. King v. United States, 1 F.(2d) 931; Coupe v. United States, 113 F.(2d) 145, certiorari denied, 310 U.S. 651; United States v. Li Fat Tong, supra; United States v. Bianco, 189 F.(2d) 716; United States v. Walker, (CA-7), — F.(2d) —. And therefore the arrest was authorized by section 104, supra.

The Fourth Amendment to the Constitution of the United States protects a citizen against unreasonable
53 searches and seizures without a search warrant. But the provision does not prohibit all searches and seizures without a search warrant. It denounces only those

which are unreasonable. But it does not undertake to define unreasonable searches and seizures. And their is no fixed formula for determining in every case whether a search and seizure was unreasonable. The frequently recurring question must be determined by reference to the particular facts and circumstances. United States v. Rabinowitz, 339 U.S. 56.

An arrest may not be used as a pretext to search for evidence of a crime. United States v. Lefkowitz, 285 U.S. 452. But when one is lawfully arrested, a search of his person without a search warrant is not forbidden by the Fourth Amendment; and anything found upon his person which is unlawful for him to have in his possession may be seized and used as incriminating evidence against him. Weeks v. United States, 232 U.S. 383; Carroll v. United States, 267 U.S. 132; Agnello v. United States, 269 U.S. 20; United States v. Di Re, 332 U.S. 581; United States v. Rabinowitz, supra.

Since the arrest was authorized by section 104, supra, and since the search and seizure incident to the arrest was not an unreasonable one, within the purview of the
54 Fourth Amendment, it follows that the motion to suppress was not well founded and that the incriminating evidence obtained by means of the search and seizure was properly admitted upon the trial of the case. Accordingly, the judgment is AFFIRMED.

HUXMAN, *Circuit Judge*, Dissenting.

The sole question in this case is whether the arrest and subsequent search of Draper without a warrant violated the Fourth Amendment to the United States Constitution which provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

At the outset it might be well to review some of the fundamental principles of law ingrained in English Jurisprudence in which must be found the answer to our

question. It may be trite to again say that the right of citizens to be secure in their homes and persons against unreasonable searches and seizures is a most
55 valuable right and heritage of American citizenship and that it must be guarded zealously and unrelentingly and that the courts must never permit it to be gradually whittled away under the guise of expediency or necessity. This was pointed out by Justice Sutherland in Byars v. United States, 273 U.S. 28, where he said, ". . . the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods. Constitutional provisions for the security of person and property are to be liberally construed, and 'it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'" No higher authority can be found than this pronouncement, and there are no subsequent decisions by the Supreme Court lowering the high standard set thereby.

There can be no question that absent extraordinary circumstances an arrest or search without a warrant constitutes a violation of the Fourth Amendment. In United States v. Vleck, 17 F. Supp. 110, the Court said, "Generally speaking, a search warrant is required for a lawful search and seizure . . . but the right to search without the warrant is the exception and not the rule." And in
56 McDonald v. United States, 335 U.S. 451, the Supreme Court said, "A search without a warrant is not justified unless the exigencies of the situation make the course imperative." What is true with regard to a search without a warrant is likewise true with respect to an arrest without a warrant.

Always, there must be present probable cause to believe that a crime has been committed, or is being committed, before one may obtain an arrest warrant or a search warrant, or to make an arrest or search without a warrant if such extraordinary circumstances are present which will support action without a warrant. Here the difficulty comes, as always, in determining what constitutes probable cause. Obviously no hard and fast rule can be

laid down. Whether there is probable cause is a legal conclusion to be drawn from a consideration of the facts.[1]

To define probable cause is not difficult. A good definition is found in Brinegar v. United States, 338 U.S. 160, where the Supreme Court defined probable cause in these terms, "'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of
57 guilt.' McCarthy v. De Armit, 99 Pa. St. 63, 69. . . . And this 'means less than evidence which would justify condemnation' or conviction. . . . Since Marshall's time . . . it has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their [the officers] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." In United States v. McCall, 243 F.2d 858, we said, "But it may be said in general terms that probable cause exists where the facts and circumstances, together with reasonable inferences fairly to be drawn from them, are such as would lead a reasonably intelligent and prudent person to conclude that there is good ground to believe that the law is being violated."

The Narcotic Agent testified that he acted solely upon the tip he received from his informer, whom he had used previously and had always found reliable. He did not know Draper, in fact, he did not know that such a person existed until he received the tip from his informer. When asked, "In other words, if it wasn't for this information there would be absolutely no facts that you per-
58 sonally knew that would give grounds for probable cause to arrest this man, all the facts you have were gained from this information? Is that not right?" Marsh answered simply, "That's right. That is where the information came from."

Whether hearsay evidence in the form of a tip from an informer is alone sufficient to constitute probable cause as grounds for a warrant, or arrest and search without warrant, has never been squarely passed upon by any court. At least no case so holding has come to light. There

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[1] Mason v. Rollins, 2 Biss. 99, 16 Fed., Cases No. 9252, p. 1061.

is dicta in a number of cases touching the question, most of which is to the effect that an informer's tip alone is insufficient to constitute probable cause for action.

In Brinegar v. United States, 338 U.S. 160, the Court said, ". . . Probable cause exists where '*the facts and circumstances' within their* [the officers] *knowledge*[1] and of which they had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution a belief that 'an offense had been or is being committed.'" In United States v. Bianco, 189 F.2d 716, where evidence had been suppressed by the Trial Court,
59 the Appellate Court said, "If this hearsay alone supported the arrest, we would not disturb the conclusion of the district court." And in Wisniewski v. United States, 47 F.2d 825, where there was a tip and also other evidence the Court found reasonable cause, although "The previous information [from the informer] may have amounted to no more than ground for suspicion. . . ." In United States v. Turner, 126 F. Supp. 349, the Court said, "In my opinion the proper rule to be deduced from many, if not most, of the well considered cases upon the subject is that, while hearsay information only is not of itself sufficient to justify the search of a moving vehicle without a search warrant, reliable information . . ." is sufficient.

An illuminating case is United States v. Clark, 29 F. Supp. 138. The facts prompting the arrest were these, (1) Clark had entered and left a certain grocery store where the agents knew narcotics were sold; (2) she (Clark) was known to be an addict; (3) a reliable informer signaled by prearranged code that she had narcotics on her person as she came out. Facts (1) and (2) were given no credence by the Court. Therefore, the question fairly presented was whether the tip from a reliable informer was sufficient to constitute probable cause. The
60 Court answered in the negative saying, "It seems to us that the Fourth Amendment to the Constitution . . . is whittled away to nothingness if it is held that a citizen may be arrested and searched without a warrant of arrest or a search warrant if only it is shown that some reliable informer has said that the citizen has committed

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[1] Emphasis supplied.

or is committing a felony, without any showing whatever (and there was none here) that the informer's information was itself more than mere guess-work and speculation."

In Johnson v. United States, 333 U.S. 10, an informer tipped off officers that unnamed persons were smoking opium in a hotel room. He surmised this from the odor emanating therefrom. The officers rushed to the room, and clearly detected the odor. Johnson opened the door at their demand and they placed her under arrest. They searched the room and found opium. Johnson alone was present. The Court indicates its disapproval of tips alone constituting probable cause either for search or arrest when it says, "Thus the Government quite properly stakes the right to arrest, not on the informer's tip and the smell the officers recognized before entry, but on the knowledge that she was alone in the room, gained only after, and wholly by reason of, their entry of her home." The Court
61 held the action of the officers was illegal and not based on probable cause.

Two cases are sometimes cited as indicating a contrary conclusion.[1] The King case is not helpful. It does not reveal that the officers acted on an informer's tip. It merely states that the officers had "reliable and positive information." It does not reveal the character of this information. The opinion in the Li Fat Tong case contains a statement that "There is no reason to suppose that hearsay evidence derived from an informer is not as competent evidence on which to show probable cause for an arrest, . . ." as any other proof, but that statement was not necessary to the decision of the case. Standing alone this might indicate that such a tip alone was sufficient to constitute probable cause. But the statement was not the basis of the opinion. An examination of the opinion clearly reveals that there were surrounding facts and circumstances observed by the officers after they had received the tip which, considered together with the tip, constituted probable cause.

Coming then to the facts of this case, the officer who made the arrest had never heard of Draper and knew

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[1] King v. United States, 1 F.2d 931, and United States v. Li Fat Tong, 152 F.2d 650.

62 absolutely nothing of his case history or reputation as a law violator, if he had one. He acted solely on the tip from an informer whom he had used before and had found reliable. The information on which he acted was that Draper had gone to Chicago by train; that he was going to bring back approximately three ounces of heroin; that he would return by train either on the morning of the 8th or 9th. That is absolutely all the information the officer had as to the prospective commission of an offense. True, the informer described Draper as to height, weight, age, how he would be dressed, that he would be carrying a zipper bag and that he habitually walked fast.

Let us suppose that with the informer's tip in hand the officer had applied to a Magistrate for an arrest warrant for Draper. He would have been laughed out of court. The Court would quite correctly state, "Why you are unable to even say that you have information leading a reasonably prudent person to conclude that an offense has been or is now being committed. All you have is a prediction of things to come. Giving the tip on which you are acting the broadest scope possible it merely indicates that a crime will perhaps be committed on either the 8th or 9th. When you have more definite
63 information that an offense has been or is being committed, come back." Then let us suppose, on the 9th, when the arresting officer saw Draper get off the train and recognized him from the description he had received, he asked the assisting policeman to keep him under observation and he hurried back to the Magistrate for the warrants, and then stated, "I now have additional information tending to corroborate the tip that an offense would be committed sufficient to lead a reasonably prudent person to believe that Draper is now committing the offense and has brought narcotics into the state" and asked for a warrant. The Magistrate then asks, "What is this additional information?" To which the officer replies, "I saw Draper get off the train coming from Chicago." The Magistrate then asks, "Did Draper go to Chicago?" To which the officer answered, "I think so, because he got off of a train that came through Chicago." The Magistrate then asks, "Was there anything suspicious about his conduct from which one might conclude that he had narcotics

in his possession?" To which the officer replies, "Well no, but he was dressed as my informer said he would be dressed, he carried a zipper bag, and walked fast as the informer stated he usually walked." That is absolutely all the additional facts and circumstances
64 the officer acquired subsequent to the original tip from which we must conclude that a reasonably prudent man might be warranted in drawing the conclusion that Draper, in fact, was violating the law at the time he stepped from the train. It is from these facts and these facts alone that a reasonably prudent person must conclude that the prediction of things to come has now come about.

As I view the case, the arrest and search must stand on the uncorroborated tip from the informer that an offense would be committed on the 8th or 9th of September, and without support of a scintilla of other evidence remotely sufficient to warrant the conclusion that Draper had committed the offense and had narcotics in his possession when he left that train. The additional facts the officers observed at the station, which my associates say corroborate the tip that an offense would be committed, and which would now warrant the officer in believing that an offense was, in fact, being committed were in their possession from the beginning. The only function of these additional facts was to enable them to identify Draper. They were intended to serve no other purpose and were intended to establish nothing other than his identity.

I fail to see how facts communicated by an
65 informer solely for the purpose of identification can, when they are found to be true, without more evidence be said to constitute reasonable cause for believing that an offense was then being committed.

In United States v. Vleck, 17 F. Supp. 110, the Court cautioned that, "When undisputed evidence of guilt is obtained as a result of an unlawful search and seizure, there is the constant tendency of courts and law enforcement officers to search out some way of circumventing the constitutional guaranties. . . ." We must never permit a relaxation or whittling away of our constitutional rights under the pretext of expediency or necessity. Surely we are not so weak and impotent that we are unable to enforce all laws, giving strict adherence to constitutional pro-

visions and rights guaranteed to the individual thereunder. For these reasons I am forced to respectfully disagree with my associates. I would reverse and remand with directions to suppress the questioned evidence.

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66 IN THE UNITED STATES COURT OF APPEALS

Judgment—September 12, 1957

Before Honorable Sam G. Bratton, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

Clerk's Note Re Rehearing

(By order of September 23, 1957, the time for appellant's petition for rehearing was extended to October 5, 1957.)

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67 IN THE UNITED STATES COURT OF APPEALS

Petition for Rehearing

Appellant respectfully petitions the Court for a rehearing of the within appeal, and as grounds therefor shows the following:

1. That the issue herein presents an important constitutional question relating to the administration of the criminal law in the Federal Courts.

2. That the issue herein has never been decided by a Court of Appeals or the United States Supreme Court, other than herein.

3. That the appellant contemplates filing a petition for a writ of certiorari with the United States Supreme Court on the issue raised herein, if said appellant can secure legal counsel to present said petition for certiorari and if this petition for rehearing is denied.

WHEREFORE, appellant respectfully prays that this Court en banc reconsider its majority opinion on this appeal, with or without reargument or additional written briefs, and withdraw the majority opinion and make the dissenting opinion the judgment of the Court.

Respectfully submitted,

JOHN J. ALTHOFF
Attorney for Appellant
Kinney Building
Greeley, Colorado

John J. Althoff, attorney for appellant, hereby certifies that in his opinion the above petition for rehearing is well-founded and is not interposed for purposes of delay.

JOHN J. ALTHOFF

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68 IN THE UNITED STATES COURT OF APPEALS

Order Denying Petition for Rehearing—October 23, 1957

Before Honorable Sam G. Bratton, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

Clerk's Note Re Mandate

(On October 29, 1957, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.)

69 (Clerk's Certificate omitted in printing)

70 SUPREME COURT OF THE UNITED STATES

(Title omitted)

Order Extending Time to File Petition for Writ of Certiorari—November 14, 1957

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 20th, 1957.

CHARLES E. WHITTAKER
Associate Justice of the Supreme Court of the United States.

Dated this 14th day of November, 1957.

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71 SUPREME COURT OF THE UNITED STATES

(Title omitted)

Order Granting Certiorari and Motion for Leave to Proceed in Forma Pauperis—June 30, 1958

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Tenth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1103 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 30, 1958

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